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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCE ANDRES MARROQUIN,

Defendant and Appellant.

C061461

(Super. Ct. Nos.
07F06777, 06F05982)

In case No. 07F06777, a jury found defendant Vince Andres Marroquin guilty of carjacking (Pen. Code, § 215, subd. (a); subsequent undesignated statutory references are to the Penal Code) and sustained an allegation that a principal was armed with a firearm (§ 12022, subd. (a)(1)). The court sentenced defendant to a middle term of five years, a consecutive one-year term for the enhancement, and a consecutive eight-month term for violating probation in case No. 06F05982.

On appeal, defendant contends: (1) the photographic lineup used to identify him violated due process; (2) there was insufficient evidence to support his conviction; (3) the court

abused its discretion in awarding victim restitution; (4) the court failed to award presentence conduct credits in case No. 06F05982; and (5) the Government Code section 70373 fees were unauthorized. We affirm the judgment.

FACTS AND PROCEEDINGS

On June 9, 2007, at around 3:30 a.m., Jose M. stopped at a Shell station while he was driving to work in his 1988 Ford Ranger pickup. As Jose M. left his truck, three men approached within five feet of him. Two of the men were Hispanic, while the third was Caucasian. One of the Hispanic men had a white T-shirt and jeans, the other Hispanic man wore a black sweatshirt and black pants, and the Caucasian man wore a red T-shirt and jeans.

The Hispanic man in the white T-shirt pointed a handgun at Jose M. and said in Spanish, "Give me the keys." The other Hispanic man said (in Spanish), "I also have a gun" and pointed to his waistband. The man who pointed to the gun in his waistband was "a little chubby" and had shoulder length hair, while the one who pointed the gun at him was shorter and thinner with shorter hair. Jose M. handed his keys to the man in the white T-shirt, and the three assailants left in his truck. The entire incident took about three minutes.

Although it was dark outside, there were lights on at the Shell station and Jose M. got a good look at his assailants. The phone at the Shell station was broken, so Jose M. walked 15 minutes to work. He let others at work know what happened, and

his nephew called the police at around 7:00 a.m. The police later interviewed Jose M. at work with the help of an English speaking coworker. Jose M. described his assailants to the officer.

Sacramento Police Officer Mohammed Rafiq interviewed Jose M. at his work on the day of the incident. Jose M. said he could identify all three of his assailants if he ever saw them again. Based on Jose M.'s description, Officer Rafiq believed the carjacking took place a few feet outside the door to the station's store.

On June 15, 2007, Folsom Police Detective Brian Lockhart found the carjacked truck in an alleyway no more than a quarter of a mile from where defendant lived. Detective Lockhart searched the truck, but found nothing. Lockhart told the Sacramento Police Department about defendant.

Sacramento City Police Detective Michael Boyd took the call from Detective Lockhart concerning the truck having been found in Folsom. During that conversation, Lockhart told Boyd about defendant being a possible suspect and said that defendant lived very close to the place where the truck was found and generally matched the description of one of the assailants.

Detective Boyd then found a photograph of defendant noting that the picture matched the description of one of the suspects that Jose M. had given the police. He then assembled a "six-pack" photo line-up that included a picture of defendant and five others of similar description.

On July 9, 2007, Boyd showed Jose M. the lineup at Jose M.'s workplace. One of Jose M.'s coworkers translated the lineup advisement form, which advises the witness to keep an open mind, not look at just one thing, try to remember the incidents, and that aspects of the suspect's appearance may have changed over time. Jose M. appeared to understand the form, which he signed.

Detective Boyd next showed the photographic lineup to Jose M. The officer testified that he never showed individual photographs to Jose M., and never conducted a photographic lineup in that manner. Jose M. identified defendant after looking at the lineup for about 20 seconds, on the basis of defendant's hair color and facial features.

According to Jose M., an officer showed up at Jose M.'s work about a month later and spoke to him through a coworker. The officer read a paper to Jose M. about photographs he would be shown, and Jose M. signed the paper after a coworker explained it. According to Jose M., he was first shown five individual photographs by the officer, and then a photographic lineup of six people. Viewing the photographic lineup, Jose M. identified defendant as the person with the gun in his waistband. He believed that he looked at the lineup for about 10 minutes before identifying defendant. Jose M. admitted he first could not identify defendant at the preliminary hearing because defendant wore different clothing than at the carjacking. He identified defendant at trial, and was

"absolutely sure" that defendant was the man with the gun in his waistband.

At some point, Detective Boyd examined the surveillance video from the Shell station from an hour before to an hour after the incident, but never found any evidence of Jose M., his truck, defendant, or any of the other assailants. Asked about the discrepancy, Jose M. said that he actually parked his truck on Del Paso Boulevard next to the Shell station, near a bus stop and a check cashing business, and was carjacked after getting out of his truck. Detective Boyd was able to use this description to then determine where Jose M. parked, a location not visible to the Shell station's cameras.

Twelve latent fingerprints were found in Jose M.'s truck. Print 10 matched Jose M. Prints 2 through 6, 8, and 12 were not defendant's, but the examiner could not say whether prints 1, 7, or 9 were not defendant's and print 11 did not have enough information to make any determination.

Kathy Pezdek, a Professor of Psychology and Associate Dean at Claremont University, testified for the defense as an expert on eyewitness identification. She identified several factors which can influence the accuracy of eyewitness identification: how long the witness focused on the suspect's face, the suggestiveness of the photographic lineup, the presence of more people at the scene, whether a weapon is present, whether the suspect and witness are of the same race, the lighting and distance between the suspect and the witness, did the witness previously see a picture of the suspect, did the witness take

more than a minute to identify the suspect in the lineup, and whether the person conducting the lineup knew which photograph was the suspect's.

Professor Pezdek found the photographic lineup was suggestive because one of the people did not appear to be Hispanic, and three others did not look like they had a chubby body. Based on her review of the case and the factors she listed, Professor Pezdek had doubts about the accuracy of the eyewitness identification.

Defendant's cousin Tessa B. lived with defendant and other family members at the time of the incident. She and defendant were alone while the rest of the family was on vacation.

On June 8, 2007, defendant came home from his job at Chili's with food from the workplace. They spent the evening and following morning watching movies on the television. Tessa B. went to bed at around 4:00 to 4:30 a.m., and defendant went to bed about an hour earlier. She had trouble sleeping, and talked to defendant while they were in bed. She was aware that the crime took place around 3:30 a.m.

DISCUSSION

I

The Lineup

Defendant argues the photographic lineup used to identify him was unduly suggestive, a violation of his right to due process. We disagree.

Defendant moved in limine to exclude the lineup at trial. The trial court denied the motion, ruling that the men in the lineup were racially and ethnically similar, their clothing was not significantly different, they all had short hair with similar haircuts, the use of headshots minimized any weight differences, they had almost identical facial hair, and there was no significant difference in backgrounds for the photos.

Defendant later renewed his objection on the basis of Jose M.'s testimony that he had first been shown individual photographs before the lineup. The court denied the objection, finding the conflict over whether Jose M. was first shown individual photographs was for the jury to consider.

In order to determine whether the admission of identification evidence violates a defendant's right to due process of law, we consider: (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification. (*People v. Ochoa* (1998) 19 Cal.4th 353, 412 (*Ochoa*); *People v. Johnson* (1992) 3 Cal.4th 1183, 1216.)

Defendant bears the burden of demonstrating the existence of an unreliable identification procedure. (*Ochoa, supra*, 19 Cal.4th at p. 412.) The crucial question is whether anything caused defendant's picture to "'stand out' from the others in a way that would suggest the witness should select him. [Citation.]" (*People v. Carpenter* (1997) 15 Cal.4th 312, 367.) There must be "'a very substantial likelihood of irreparable misidentification'" under the "'totality of the circumstances'" to warrant reversal of a conviction on this ground. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 106, fn. 8, 116 [53 L.Ed.2d 140, 149, 155].)

It remains unsettled whether the suggestiveness of a lineup procedure is a question of fact subject to deferential review on appeal or a mixed question of law and fact subject to de novo review. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1222.) Like our Supreme Court in *DeSantis*, we independently review the issue of suggestiveness, resolving any factual conflicts in favor of the trial court's findings, express or implied, as long as they are supported by substantial evidence. (*Ibid.*; see *People v. Waidla* (2000) 22 Cal.4th 690, 730 [supplying standard of review for mixed questions].)

Although the lineup contains only headshots, appellant argues that the people depicted in four of the photos, Nos. 1, 2, 4, and 6, did not appear chubby, and defendant's photo, No. 5, shows the heaviest person. Also, defendant asserts that his hair is the only one that is not shaved. This, along with the conflict over whether Jose M. was first shown individual photos,

leads defendant to conclude that the lineup was unduly suggestive and Jose M.'s identification of him was not reliable.

Our observation of the photographic lineup does not support defendant's argument. The photographs are of comparable size and composition, and the subjects are similar in appearance, age, and physical characteristics. We reject defendant's contention that any variance in weight or hair length made his photograph stand out from the rest. All of the photographs were of short haired Hispanic males of similar age wearing T-shirts with a small amount of facial hair. Defendant's photograph did not show him to be clearly heavier nor have substantially longer hair than the other men in the lineup. "[T]here is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) We also agree with the trial court that the conflict between Jose M. and Detective Boyd over whether Jose M. was shown individual photographs went to the weight rather than the admissibility of the identification evidence.

Inasmuch as we find that the lineup was not unduly suggestive, our due process inquiry ends, and we need not consider the question of whether Jose M.'s pretrial identification was nevertheless reliable under the totality of the circumstances. (*Ochoa, supra*, 19 Cal.4th at p. 412.) The trial court did not err in declining to suppress Jose M.'s pretrial identification and resulting in-court identification of defendant.

II

Sufficiency of the Evidence

Defendant notes the People's case was based on the identification of a single eyewitness, Jose M., who contended he was shown individual photographs before the lineup, and gave testimony regarding the location of the crime, which was contradicted by the surveillance video. From this, defendant infers that Jose M.'s testimony was insufficient to support the conviction. Again we disagree.

"The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]" (*In re Frederick G.* (1979) 96 Cal.App.3d 353, 366.) In deciding whether substantial evidence supports the trial court's findings, we do not evaluate the credibility of witnesses; that is within the provenance of the trier of fact. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) "[U]nless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

Jose M.'s testimony was not inherently incredible or unreliable. Contrary to defendant's speculation, it is clear that Jose M. was a victim of a crime even if it is unclear precisely where the crime took place. Jose M., through his nephew, told the police that his truck had been forcibly taken, and several days later the truck was found abandoned in an alleyway near defendant's residence.

Jose M.'s testimony and his initial account to the police cannot be squared with the surveillance video. However, Detective Boyd's subsequent interview with Jose M. allowed him to determine that Jose M. parked the truck near the Shell station, but outside the range of the surveillance cameras.

We have already rejected defendant's contention that the identification evidence was unreliable and will not reconsider it under the guise of his insufficient evidence claim. Jose M.'s testimony that he was the victim of a carjacking and defendant was one of the perpetrators was neither inherently improbable nor impossible. As such, it was legally sufficient to support defendant's conviction for carjacking. Any discrepancies in Jose M.'s testimony were matters of credibility for the jury to consider.

III

Victim Restitution

Jose M. told the probation officer that while his truck was recovered, he had to pay \$375 for towing and storage and that his 70 CD stereo, two 12-inch speakers, and amplifier with a total value of \$498.98 were missing. The court ordered defendant to pay \$874.98 to Jose M. in victim restitution pursuant to section 2085.5, subdivision (b).

At trial, there was testimony that a "radio" and a turn signal which had been broken off had been found and booked into evidence. Defendant claims that the restitution order was an abuse of discretion since it was partially based on the loss of a stereo, which the police recovered.

A court is required to order direct victim restitution in "every case in which a victim has suffered economic loss as a result of the defendant's conduct." (§ 1202.4, subd. (f).) "We review a restitution order for an abuse of discretion and will not disturb the trial court's determination unless it is arbitrary, capricious and exceeds the bounds of reason. [Citations.]" (*People v. Maheshwari* (2003) 107 Cal.App.4th 1406, 1409.)

Defendant never objected to the restitution order in the trial court. Since defendant's claim goes to whether the restitution order was an abuse of discretion rather than whether the restitution order was authorized, his contention is forfeited on appeal. (*People v. O'Neal* (2004) 122 Cal.App.4th 817, 820.)

We also reject the claim on the merits. A car radio is very different from a 70 CD stereo, amplifier, and 12-inch speakers. The court could reasonably conclude that while Jose M.'s radio had been recovered, the accessories he reported missing were not. The restitution order for the loss of these audio components was not an abuse of discretion.

IV

Presentence Conduct Credits

Defendant and the Attorney General agree that the court failed to order presentence conduct credits in case No. 06F05982.

Originally, in case No. 06F05982, the trial court placed defendant on five years' probation and ordered him to serve 180

days in jail with 35 days' credit. Sentencing him for the probation violation, the court imposed an eight-month term consecutive to defendant's sentence in case No. 07F06777, but did not mention his presentence credits in case No. 06F05982. The minute order and abstract of judgment for case No. 06F05982 show defendant receiving 188 days' credit for time served with no award for conduct credit.

There is no indication in the record that defendant was not entitled to conduct credit in case No. 06F05982. Under section 4019, a defendant is entitled to presentence conduct credit, calculated ""by dividing the number of days spent in custody by four and rounding down to the nearest whole number. This number is then multiplied by two and the total added to the original number of days spent in custody. [Citation.]" [Citation.]' [Citation.]" (*People v. Philpot* (2004) 122 Cal.App.4th 893, 908.) Accordingly, defendant is entitled to a total of 94 days of custody credits along with 188 days of actual credits, for a total of 282 days of presentence custody credit in case No. 06F05982. We modify the judgment to correct the court's error.

V

Court Facilities Assessment

Defendant contends that the prohibition on ex post facto punishment precludes the trial court from imposing a \$30 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)) on remand because the statute providing for that fee became effective on January 1, 2009, after the date of defendant's offense. He is mistaken.

In *People v. Castillo* (2010) 182 Cal.App.4th 1410, this court rejected this exact argument. (See also *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1.)

The California Supreme Court reached a similar conclusion regarding an analogous statute. In *People v. Alford* (2007) 42 Cal.4th 749, a statute effective after Alford's crime imposed a court security fee on every conviction. (See § 1465.8.) Because the statute was part of a budgeting bill, the court concluded that "the Legislature intended to impose the court security fee to all convictions after its operative date." (*Alford*, at p. 754.)

Further, like the court security fee, the criminal conviction assessment for court facilities was enacted as part of the budgeting process. (See *Castillo, supra*, 182 Cal.App.4th at p. 1413.) In *Alford*, the California Supreme Court viewed such circumstance as an indication that the court security fee was meant to apply to convictions incurred after its operative date. (*People v. Alford, supra*, 42 Cal.4th at p. 754; accord, *People v. Rivera* (1998) 65 Cal.App.4th 705, 710 [ex post facto claim case].) The same rationale applies here.

We conclude that the trial court properly imposed the assessments.

DISPOSITION

The judgment is modified to award defendant 94 days of presentence conduct credit in case No. 06F05982. As modified, the judgment is affirmed. The trial court is directed to

prepare a corrected abstract of judgment and to forward the
abstract to the Department of Corrections and Rehabilitation.

_____ HULL _____, J.

We concur:

_____ SCOTLAND _____, P. J.

_____ BUTZ _____, J.